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M.Z., Appellant)	
)	
and)	Docket No. 15-1744
)	Issued: April 26, 2016
DEPARTMENT OF HOMELAND SECURITY,)	
EMERGENCY PREPAREDNESS &)	
RESPONSE, Forrest Hills, NY, Employer)	
)	

Case Submitted on the Record

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

On August 18, 2015 appellant filed a timely appeal of a July 15, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated December 4, 2014 and the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of the claim.

The issue is whether OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 3, 2012 appellant, then a 45-year-old mission support specialist, filed a traumatic injury claim (Form CA-1) alleging that he strained or pinched his left shoulder and upper back on November 15, 2012 when he was reportedly running from a dog and fell off a porch. He sought medical treatment on December 3, 2012.

OWCP denied appellant's claim for traumatic injury on April 12, 2013. Appellant requested a review of the written record by an OWCP hearing representative on May 1, 2013. By decision dated September 11, 2013, the OWCP hearing representative affirmed OWCP's April 12, 2013 decision finding that appellant had not submitted the necessary medical opinion evidence to establish an injury causally related to his November 15, 2012 fall at work.

On April 11, 2013 Dr. Paul Saiz, a Board-certified orthopedic surgeon, examined appellant for increased stiffness in this back. He diagnosed preexisting degenerative disc disease as well as employment-related low back strain and sprain.

Appellant submitted a narrative statement and explained that he was working in support of the Hurricane Sandy relief effort and knocking on doors on November 15, 2012. He approached the open door of a home and saw a large dog running toward him. Appellant attempted to run from the dog but fell off the porch, which was six or seven steps high. He tried to break his fall with his arms but fell on his left arm, shoulder, and the left side of his back. He continued to have left shoulder and back pain.

Dr. Daniel A. Romanelli, an orthopedic surgeon, examined appellant on October 1, 2013 and described his history of injury. He opined that appellant had sustained a superior labrum, anterior to posterior (SLAP) tear of his left shoulder due to the November 15, 2012 employment incident as a direct result of the fall.

Appellant requested reconsideration on November 25, 2013 and asserted that he was experiencing increasing back and neck pain. Appellant alleged headaches, nausea, dizziness and pain from his neck down through his lower back.

Dr. Romanelli examined appellant on November 26, 2013 and diagnosed cervical neck pain with headaches and nausea.

By decision dated December 17, 2013, OWCP accepted the claim for left shoulder SLAP tear and approved shoulder surgery. It further found that appellant had not submitted the necessary medical opinion evidence to establish a causal relationship between his diagnosed lumbar strain and his November 15, 2012 employment incident.

On February 3, 2014 Dr. Gregory R. Misenhimer, a Board-certified orthopedic surgeon, examined appellant due to neck and low back pain. He related appellant's history of falling from a porch, landing on his left shoulder and neck. Dr. Misenhimer found limited range of motion of the cervical spine, normal muscle strength, and intact sensation. He also reported moderately reduced range of motion of the lumbar spine with pain. Dr. Misenhimer diagnosed cervical disc degeneration, cervicgia, lumbago, and lumbar degenerative disc disease.

Dr. Romanelli, on February 19, 2014, performed left shoulder arthroscopy with removal of loose body, microfracture of the glenoid, microfracture and chondroplasty of the humeral head, debridement of the anterior SLAP parrot beak lesion and subacromial decompression and adhesion lysis.

On March 11, 2014 appellant requested reconsideration of the December 17, 2013 decision relating to his denied lumbar condition. By decision dated March 19, 2014, OWCP declined to reopen appellant's claim for consideration of the merits as he failed to submit evidence or argument in support of his request for reconsideration.

Through a form dated July 17, 2014 appellant requested reconsideration of the December 17, 2013² OWCP decision. He completed a narrative statement and alleged that his neck and back pain had increased. Appellant alleged that this condition was due to his accepted employment injury.

Dr. Misenhimer examined appellant on May 12, 2014. He noted, "[Appellant] reports the pain to his neck and back are related to the injury which occurred on November 15th 2012. Although his neck and back injuries have not been approved as compensable." Dr. Misenhimer diagnosed lumbago, lumbar degenerative disc disease, cervical disc degeneration, and cervicgia.

In an August 18, 2014 letter, OWCP noted that appellant incorrectly requested reconsideration of a December 17, 2014 decision and informed him that it would take no action on his claim. Appellant responded on September 4, 2014 and indicated that he wanted reconsideration of the December 17, 2013 decision. He referenced Dr. Misenhimer's reports and alleged having increased neck and back pain as well as decreased range of motion.

Appellant requested a schedule award through a claim for compensation (Form CA-7) on October 8, 2014.

In a September 29, 2014 letter, OWCP requested additional information regarding appellant's neck condition. Appellant responded on November 26, 2014 and attributed his neck and back condition to his initial employment injury.

Dr. Misenhimer completed a report on November 19, 2014 and noted that appellant believed his injury occurred at work. He diagnosed cervicgia and described appellant's history of falling from a porch landing on his neck and shoulder. Dr. Misenhimer opined, "I believe that the mechanism of injury is exactly consistent with an injury to both the cervical spine and the left shoulder. While [appellant] may have had underlying degenerative conditions, the pain that he is now experiencing is directly related to his fall." He continued, "While there is no disc herniation, I believe that the twisting motion and the trauma imparted to the cervical spine at the time of impact caused the disc at the above-mentioned areas to undergo a torqueing motion thus causing the pain that [he] is now experiencing."

² Appellant mistakenly wrote December 17, 2014 rather than 2013.

By decision dated December 4, 2014, OWCP granted appellant a schedule award for nine percent permanent impairment of the left upper extremity.

In a letter received by OWCP on April 3, 2015, appellant again requested reconsideration using the appeal form from the original April 12, 2013 decision denying his claim. He submitted a March 4, 2015 report from Dr. Brian P. Delahoussaye, a Board-certified physiatrist, describing the 2012 work incident. Dr. Delahoussaye indicated that appellant tripped over a banister and fell landing on his hip and onto his back with his left side. He noted that appellant tried to break his fall with his arms. Dr. Delahoussaye examined appellant and diagnosed lumbar strain, neck sprain, cervical disc degeneration, as well as preexisting cervical spondylosis and lumbar spondylosis. He determined that appellant had asymptomatic cervical and lumbar spondylosis prior to his employment injury. Dr. Delahoussaye found, “It is my opinion to a reasonable degree of medical probability that the preexisting conditions of cervical spondylosis and lumbar spondylosis were aggravated by the fall that occurred at work. As a result of this, he developed a cervical sprain, a lumbar sprain and left lower extremity sciatica.” He also concluded that appellant developed headaches and occipital neuralgia due to his fall.

By decision dated July 15, 2015, OWCP declined to reopen appellant’s claim for consideration of the merits as his request for reconsideration was untimely filed as it was not received within one year of the April 12, 2013 decision. It further found that appellant’s request for reconsideration did not demonstrate clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA³ does not entitle a claimant to a review of an OWCP decision as a matter of right.⁴ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.⁵ OWCP, through regulations has imposed limitations on the exercise of its discretionary authority. One such limitation is that OWCP will not review a decision denying or terminating a benefit unless the application for review is timely. In order to be timely, a request for reconsideration must be received by OWCP within one year of the date of OWCP’s merit decision for which review is sought. Timeliness is determined by the document receipt date of the reconsideration request [the “received date” in the Integrated Federal Employee’s Compensation System (iFECS)].⁶ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).⁷

³ 5 U.S.C. § 8128(a).

⁴ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

⁵ *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

⁶ 20 C.F.R. § 10.607; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (October 2011). *G.F.*, Docket No. 15-1053 (issued September 11, 2015).

⁷ *Supra* note 4 at 769; *Jesus D. Sanchez*, *supra* note 5 at 967.

FECA provides in section 8128(a) that OWCP may review an award for or against payment of compensation at any time on its own motion or on application by the claimant.⁸ Section 10.606(b)(3) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by submitting in writing an application for reconsideration which sets forth arguments or evidence and shows that OWCP erroneously applied or interpreted a specific point of law; or advances a relevant legal argument not previously considered by OWCP; or includes relevant and pertinent new evidence not previously considered by OWCP.⁹ Section 10.608 of OWCP's regulations provides that when a request for reconsideration is timely, but does meet at least one of these three requirements, OWCP will deny the application for review without reopening the case for a review on the merits.¹⁰

ANALYSIS

The Board finds that appellant filed a timely request for reconsideration. OWCP regulations provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP merit decision.¹¹ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹² OWCP received appellant's September 4, 2014 request for reconsideration within one year after the last merit decision dated December 17, 2013, thereby rendering it timely filed.

Therefore, the Board finds that appellant's September 4, 2014 request for reconsideration regarding denial of his claim for a lumbar condition must be adjudicated by OWCP under the standards of 20 C.F.R. § 10.606(b)(3). On remand, OWCP should review appellant's request for reconsideration and any evidence submitted after the December 17, 2013 merit decision under the appropriate standard for a timely reconsideration request and issue an appropriate decision.

As to appellant's cervical condition, the Board notes that this aspect of appellant's claim is still under development by OWCP. As OWCP has issued no final decision on this issue, the Board lacks jurisdiction to render a decision.¹³

⁸ 5 U.S.C. §§ 8101-8193, 8128(a).

⁹ 20 C.F.R. § 10.606(b)(3).

¹⁰ *Id.* at § 10.608.

¹¹ *Id.* at § 10.607(a). The one-year period begins on the date of the original decision, and an application for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought for merit decisions issued on or after August 29, 2011. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011).

¹² *Robert F. Stone*, 57 ECAB 292 (2005).

¹³ 20 C.F.R. § 501.2(c)(2).

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration as finding it was untimely filed and failed to establish clear evidence of error. On remand, OWCP shall apply the appropriate standard and issue an appropriate decision on appellant's claim.

ORDER

IT IS HEREBY ORDERED THAT July 15, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision.

Issued: April 26, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board